

# Federal Contract Labor Standards Statutes: An Overview

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## Summary

In the late 1920s, following action taken in a number of states in dealing with state contracts, the federal government began development of a body of labor standards protections for workers employed by private contractors in federal contract work. The first of these statutes, the Davis-Bacon Act (1931), set basic labor standards (primarily, prevailing wage rates) for workers engaged in construction work, under contract, for the federal government. Two other major contract labor standards statutes followed: the Walsh-Healey Public Contracts Act (1936) and the McNamara-O'Hara Service Contract Act (1965)—respectively dealing with labor standards for workers engaged in contracts for production of goods and the provision of services.

These statutes, amended from time to time and supplemented by other enactments, deal only with federal contract work. They do not directly impact work performed for private sector entities. Clearly, however, there are economic implications from these primary federally contracting statutes for private sector work. In part, the thrust of the statutes was to establish the federal government as a *model employer* to be emulated by the private sector. More directly, they were intended to provide economic protections to the targeted groups of workers and to assist, in some measure, in stabilizing the industries directly involved.

Both Davis-Bacon and Walsh-Healey were enacted prior to the more general Fair Labor Standards Act (FLSA, 1938) which has come to provide a structure of minimum wages, overtime pay requirements, restraints upon child labor and industrial homework, among other things, both for public and private workers. Indeed, the McNamara-O'Hara Act was shaped and, finally, adopted while FLSA amendments (those of 1961 and 1966) were being developed to bring wage/hour protections to service workers.

Through the years, these statutes have been the focus of numerous hearings and an extensive literature. Their provisions have been added to various federal program statutes, usually by reference. And, they have sparked substantial debate, pro and con.

This report presents a brief historical introduction to the three federal contract labor standards statutes—Davis-Bacon, Walsh-Healey, and McNamara-O'Hara—and suggests how the several enactments (with the FLSA) are similar and different. It will be updated from time to time as conditions warrant.

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During the past century, Congress adopted a series of labor standards statutes applicable to contract work for the federal government: construction, production of goods, or provision of services. These statutes do not apply to the private sector except when it is engaged in contract work for the federal government. In some instances, coverage is triggered by a contract to which the federal government is a signatory. On other occasions, the laws may apply to various forms of federally assisted work through grants, loan guarantees, revolving funds, and the like.

The first of these statutes, the Davis-Bacon Act (1931), set certain wage and related standards for federal contract construction work. In 1936, Congress added the Walsh-Healey Public Contracts Act, setting basic labor standards in the production of goods under contract for the federal government. The third of these statutes, the McNamara-O'Hara Service Contract Act (1965), mandates minimum labor standards where services are provided, under contract, to the federal government.<sup>1</sup> These statutes are supplemented by other federal enactments and, often, by laws at the state and local level.

This report sketches the history of these statutes: what they provide, how they are similar, and how they differ. It suggests how they fit into the broader framework of general wage/hour and related legislation. And, it notes certain areas of controversy that have developed with respect to the several enactments.

## Introduction

Early in the 19<sup>th</sup> century, the federal government began development of a special body of labor standards protections applicable to its own direct workforce. However, much of the work of the federal government was not undertaken by its direct employees, but rather through contracts with the private sector: by employers who operated beyond the reach of federal regulation and to whom standards applicable to federal employees did not apply.

Through the early 20<sup>th</sup> century, public work was awarded to the lowest *responsible* bidder. *Responsible* was defined as the ability to fulfill the terms of the contract: that is, to provide the goods, services, or construction work the government sought. No consideration was given to the conditions under which such work was performed.<sup>2</sup> Regulation of wages, hours, and child labor was regarded as beyond the reach of government. Attempts to legislate in those areas were generally found to be unconstitutional and were vigorously opposed as an illegal and unjustified intrusion upon private sector prerogatives. Industrial health, safety and sanitation were left, largely, to local jurisdictions. Where states and local governments were able to enact measures that would withstand the test of constitutionality, they appear to have been of little impact: either lacking substance or unenforced.

Most contractors appear to have been reputable; some were not. Often, bid brokers sought contracts and then, with the award in hand, would sub-contract to firms willing to work at the lowest cost.<sup>3</sup> Since government would normally specify the quality of the fabric or materials, the

<sup>1</sup> These statutes are supplemented by other federal enactments, *inter alia*: the Copeland "anti-kickback" Act (1934), the Fair Labor Standards Act (1938), and the Occupational Safety and Health Act (1970). The Davis-Bacon Act has been supplemented by the Contract Work Hours Standards Act (1962) and the Contract Work Hours and Safety Standards Act (1969).

<sup>2</sup> See O. R. McGuire, "Advertisements for Proposals on Public Contracts," *The Constructor*, August 1930, pp. 24-26, for a discussion of contractor responsibility.

<sup>3</sup> See "Solutions to the Bid Peddling Problem," *The Constructor*, April 1932, pp. 20-21 and 39, and "Bid Peddling vs. Price Padding," *The Constructor*, June 1932, pp. 12-13, both by W. F. Creighton.

style and construction standards, the prime area in which to cut costs was on labor: engaging the cheapest viable workers and pressing them to work as long as endurance would permit. These were often not permanent employees of the contractor but, rather, casual workers whose welfare was of little continuing concern—neither to the bid broker nor to the sub-contractor.

Where government protected its own direct workforce through wage/hour and related standards, contracting out for public work placed a premium on low wages and sometimes led to adverse working conditions. By paying less, private contractors could enhance their competitive position. Thus, an informal alliance might be struck between the procurement officer and the low-wage employer, each, for their own reasons, conspiring to cut costs by keeping wages low. At the same time, by indirectly tolerating abusive conditions, government sacrificed its role as a model employer (an oft-expressed desire) and as an example for the private sector.<sup>4</sup>

## Evolving Federal Contract Labor Standards Policies

First the states and then the federal government embarked upon a program of reform: often encountering constitutional challenges.<sup>5</sup> But, in at least two areas, government was free to act. *As an employer*, it could set standards that applied to its own direct employees—just as any private sector employer could then do. More significant here, *as a consumer*, it could set standards for the goods, services and construction that it was willing to purchase in the public marketplace. It could, for example, write into bid specifications requirements that certain unfair labor practices would not be tolerated in the context of public procurement. And, in that way, it reserved to itself the right to define the concept of fairness.

### The Davis-Bacon Act (1931)

During the years following World War I, various efforts were made to bring a greater level of professionalism to the construction industry. However, certain practices continued that embarrassed the better contractors and complicated the process of doing business with government. Assessing contractor and worker credentials posed a problem. For example, was a particular firm equipped to fulfill the terms of a specific contract, and were the workers employed by the firm competent workmen? Some contractors would bid above their level of expertise and, having won a contract on the basis of the lowest projected costs, would then attempt to draw together a workforce. Sometimes they were successful, but at other times they may not have been.<sup>6</sup>

<sup>4</sup> An account of the reform movement of the late 19<sup>th</sup> and early 20<sup>th</sup> centuries is presented in Landon R. Y. Storrs, *Civilizing Capitalism: The National Consumers' League, Women's Activism, and Labor Standards in the New Deal Era* (Chapel Hill: University of North Carolina Press, 2000). See also David A. Moss, *Socializing Security: Progressive-Era Economists and the Origins of American Social Policy* (Cambridge: Harvard University Press, 1996), and Irwin Wellowitz, *Labor and the Progressive Movement in New York State, 1897-1916* (Ithaca: Cornell University Press, 1965).

<sup>5</sup> Concerning early state initiatives, see David B. Johnson, "Prevailing Wage Legislation in the States," *Monthly Labor Review*, August 1, 1961, pp. 839-845.

<sup>6</sup> Lloyd Smith, "To Eliminate Irresponsible Bidders," *The Constructor*, January 1925, pp. 23, 64; "When Low Bids Are Too Expensive," *The Constructor*, February 1930, pp. 40-41 and 58; C. W. Butts, "The Necessity for Prequalification: Over Optimism on the Part of Contractors Requires a Check," *The Constructor*, March 1930, pp. 40-41; E. A. St. John, "Cooperation Eliminating Irresponsibility," *The Constructor*, April 1930, pp. 35-36; and "Hard Facts About Contractors," *The Constructor*, September 1930, pp. 28-30.

It was also alleged that itinerant contractors would enter a local market, bid on public construction work, bring onto the worksite a crew from outside the area, complete the work, and move on. Some of these contractors did excellent work: perhaps better than local firms could have done or were equipped to do. But, it appears, there were also firms that were less-than-competent and to whom the opprobrious title, *fly-by-night* operators, was given. In either case, outside firms came under attack during the 1920s—increasingly so as the Great Depression dawned and as local companies and their employees became desperate for work.<sup>7</sup>

As the federal government commenced major expenditures for public buildings and public works, the broader, more abstract, issue of fairness (in terms of wages, hours and conditions of work) combined with wage-based economic competition as an issue of public policy. In part, the federal construction program was intended to spur the economy of depressed areas by providing jobs for local workers and contracts for their employers. But, it appears, outside contractors, working with imported low-wage crews, would often underbid local firms and, once having finished the immediate project, would move on.<sup>8</sup> The economic impact sought from the work was, thus, defused: the effort to provide work (and contracts) for distressed communities, frustrated.

But, public contracting activity of the 1920s and 1930s needs further exploration. How frequently, for example, did outside contractors compete with local firms on an unfair basis, however defined? What were their labor practices? The quality of work of the respective firms and the economic/cost implications of dealing with local or outside contractors needs assessment. Much of what is asserted with respect to this period appears to be anecdotal.

## Davis-Bacon Enacted

In 1931, as an emergency measure urged by President Herbert Hoover, Congress adopted the Davis-Bacon Act (P.L. 71-798).<sup>9</sup> It mandated that not less than the locally “prevailing rate of wages for work of a similar nature” had to be paid on construction work to which the federal government (or the District of Columbia) was a party.<sup>10</sup> No specific rate was set; but the act provided:

... in case any dispute arises as to ... the prevailing rates of wages for work of a similar nature applicable to the contract which can not be adjusted by the contracting officer, the matter shall be referred to the Secretary of Labor for determination and his decision thereon shall be conclusive on all the parties to the contract.

In effect, the initial determination was left to the parties (to the contractor and the workers) and only secondarily to the Secretary of Labor. In that manner, Congress sought to end the wage-based competition from the fly-by-night operators, to stabilize the local contracting community, and to protect workers from unfair exploitation. Employers could compete on the basis of

<sup>7</sup> U.S. Congress, House Committee on Labor, *Hours of Labor and Wages on Public Works*, hearings on H.R. 17069, 69<sup>th</sup> Cong., 2<sup>nd</sup> Sess., February 18, 1927 (Washington, GPO, 1927), p. 2.

<sup>8</sup> See testimony of Labor Secretary William N. Doak in U.S. Congress, Senate Committee on Manufactures, *Wages of Laborers and Mechanics on Public Buildings*, hearings on S. 5904, 71<sup>st</sup> Cong., 3<sup>rd</sup> Sess., February 3, 1931, pp. 2-3.

<sup>9</sup> See 40 U.S.C. §§ 276a-276a-5. (See also 40 U.S.C. §§ 3141-3148.) Various versions of the final legislation had been considered through several Congresses prior to its enactment. The final legislation was introduced by Senator James Davis (R-Pa.), who had served as Secretary of Labor under Presidents Harding, Coolidge and Hoover, and by Representative Robert Bacon (R-N.Y.).

<sup>10</sup> The Davis-Bacon Act provides a wage floor. Contractors may need to pay in excess of the Davis-Bacon rate in order to secure qualified workers.

efficiency, skill, or any other factor except wages.<sup>11</sup> Substantively, the act was contained in one relatively brief paragraph.

## Evolution of the Statute

Problems, largely unaddressed in the original statute, quickly arose. Oversight hearings commenced almost immediately; but, in January 1932, before Congress could act, President Hoover issued Executive Order No. 5778 in an attempt to improve the administration of the statute. While the Order was not successful as administrative reform, it did defer formal amendment of the act for several years.<sup>12</sup>

As enacted in 1931, the Davis-Bacon Act attracted many critics.<sup>13</sup> Some contractors, it was alleged, paid the locally prevailing wage—but then demanded rebates from their employees. In 1934, Congress adopted the Copeland “anti-kickback” Act (P.L. 73-324). The act, specified a fine of up to \$5,000 or imprisonment of up to five years, or both, for anyone who induces any person engaged in covered federal construction work “to give up any part of the compensation to which he is entitled under his contract of employment, by force, intimidation, threat of procuring dismissal from such employment, or by any other manner whatsoever.”<sup>14</sup>

Other complications arose as well with respect to the Davis-Bacon Act, most of which were addressed in amendments adopted in 1935 (P.L. 74-403). Among the changes made in the statute were the following. *First*. In 1931, the dollar volume coverage threshold had been set at \$5,000. However, it was charged that contractors fragmented their work to make it come in under the threshold—a matter of particular concern with respect to painting and decorating. Thus, the threshold was lowered to \$2,000 and coverage for painting and decorating work was specified in the statute. *Second*. Where the 1931 statute had concerned only public buildings, the 1935 amendments extended coverage to include public works. *Third*. The Comptroller General would be directed to prepare a list of contractors who have “disregarded their obligations to employees and subcontractors.” Listed violators would be barred from federal contracts for a period of three years. *Fourth*. Davis-Bacon contracts were to state “the minimum wages to be paid various classes of laborers and mechanics.” Thus, there would be a pre-determination of the Davis-Bacon wage rate: that is, prior to the submission of bids by the contractor. *Fifth*. The 1935 amendments added various enforcement and related administrative provisions.<sup>15</sup>

<sup>11</sup> In the Senate report on the Davis-Bacon legislation, it was affirmed that the “measure does not require the Government to establish any new wage scales in any portion of the country.” Instead, “[i]t merely gives the Government the power to require its contractors to pay their employees the prevailing wage scales in the vicinity of the building projects. This is only fair and just to the employees, the contractors, and the Government alike.” See U.S. Congress, Senate, *Regulation of Wages Paid to Employees by Contractors Awarded Government Building Contracts*, report to Accompany S. 5904, 71<sup>st</sup> Cong., 3<sup>rd</sup> sess., S.Rept. 1445 (Washington, GPO, 1931), pp. 1-2.

<sup>12</sup> Proclamations and Executive Orders: Herbert Hoover, March 4, 1929 to March 4, 1933. Washington, Govt. Print. Off., 1974, vol. 2, pp. 1066-1067.

<sup>13</sup> See the editorial, “Defects Seen In Davis-Bacon Law,” *The Constructor*, July 1931, p. 17.

<sup>14</sup> See U.S. Congress, Senate Subcommittee of the Committee on Education and Labor, *Investigation of the Relationship Existing Between Certain Contractors and Their Employees in the United States*, hearings on S.Res. 228, 73<sup>rd</sup> Cong., 2<sup>nd</sup> sess., Part 1, May 4 and 7, and June 21-23, 1934 (Washington, GPO, 1934), p. 3; and, *Congressional Record*, April 26, 1934, p. 7401; June 7, 1934, p. 10759; and June 15, 1934, p. 11624.

<sup>15</sup> U.S. Congress, House Committee on Labor, *Amend the Act Approved March 3, 1931, Relating to Rate of Wages for Laborers and Mechanics Employed on Public Buildings*, report to accompany S. 3303, August 9, 1935 (Washington, GPO, 1935), p. 1. See also editorial, “Reinterpreting the Davis-Bacon Law,” *The Constructor*, January 1932, pp. 15-16.



After 1935, though some found aspects of the statute and its administration with which to disagree, the Davis-Bacon Act emerged as a regular component of federal procurement policy. Gradually, Congress wrote Davis-Bacon requirements into a number of program statutes involving federally assisted construction.

In the early 1960s, Congress undertook a review of the statute: the first major oversight of the act since the 1935 amendments were adopted. The investigation and hearings led to two changes. *First.* Although there was often disagreement about specific coverage and/or wage rate determinations, there was no independent review provided for decisions of the Secretary. Some, primarily from industry, urged that a formal judicial review option was needed. Others suggested an internal review structure within the Department of Labor (DOL). On January 3, 1964, Secretary of Labor Willard Wirtz moved unilaterally to establish a Wage Appeals Board within DOL—short-circuiting a legislative initiative then before Congress.<sup>16</sup> *Second.* As compensation increasingly came to include fringe benefits, some felt that the Davis-Bacon rates (cash wages per hour) were outdated. In the spring of 1964, Congress amended Davis-Bacon to expand the definition of wage to include certain fringe benefits or, as an alternative, a fringe benefit component (P.L. 88-349).<sup>17</sup>

## Areas of Controversy

In almost every session of the Congress since the 1960s, the Davis-Bacon Act has emerged in some context. Often, debate has focused upon inclusion of Davis-Bacon provisions in various program statutes. But, the act has also been directly an object of dispute.

In 1971, President Richard Nixon briefly suspended the act as part of his program to control inflation.<sup>18</sup> The suspension lasted just over one month, after which the act was fully restored.<sup>19</sup> In October 1992, during the presidential campaign, President George H. W. Bush suspended the statute as it might have been applied to federal construction associated with hurricanes Andrew and Iniki. It was restored shortly after the election of 1992 by President William Clinton.<sup>20</sup> Again, on September 8, 2005, President George W. Bush suspended the Davis-Bacon Act as part of a program to clear up the destruction associated with Hurricane Katrina. As in 1992, the suspension was for a limited area (parts of Florida, Alabama, Mississippi, and Louisiana) and for a limited, if unspecified, duration.<sup>21</sup> Within two months, the President announced that Davis-Bacon would be reinstated on November 8, 2005.<sup>22</sup>

<sup>16</sup> *Federal Register*, January 4, 1964, pp. 118-119. With some modifications of structure and procedures, the Board remains in place. Broader issues—applicability of the statute, for example—are appealed to the courts.

<sup>17</sup> *Congressional Quarterly Almanac*, 1964, Congressional Quarterly, Inc., Washington, 1965, pp. 576-577.

<sup>18</sup> On June 5, 1934, the Davis-Bacon Act was suspended by President Franklin Roosevelt, apparently in order to avoid confusion with other New Deal statutes. On June 30, 1934, the act was quietly restored. See *John Herling's Labor Letter*, March 13, 1971, p. 3; and *Statutes at Large*, vol. 48, part 2, pp. 1745-1746, and vol. 49, part 2, p. 3400.

<sup>19</sup> Section 276a-5 provides that the President “is authorized to suspend” the act “[i]n the event of national emergency ....” The statute does not define *national emergency*. In June 1934, President Roosevelt suspended the act, briefly, while shaping the various New Deal programs, but this appears to have been without controversy. See archived CRS Report 79-249, *The Davis-Bacon Act Suspension of 1971*, by William G. Whittaker.

<sup>20</sup> See Proclamation 6491, reproduced in *Weekly Compilation of President Documents*, vol. 28, no. 42, October 19, 1992, pp. 1936-1937; The White House, Office of the Press Secretary, “Emergency Suspension of the Davis-Bacon Act,” press release, October 14, 1992, 2 p.; and *Federal Register*, March 10, 1993, p. 13189.

<sup>21</sup> See White House press release, September 8, 2005.

<sup>22</sup> See Griff Witte, “Prevailing Wages To Be Paid Again on Gulf Coast,” *Washington Post*, October 27, 2005, pp. A1-A10; and CRS Report RL33100, *The Davis-Bacon Act: Suspension*, by William G. Whittaker.



The Comptroller General, during consideration of the original Davis-Bacon legislation, had pointed to what he perceived to be flaws in the proposal. Through the years, the General Accounting Office (GAO, now the General Accountability Office) had continued to critique both the statute and its administration by the DOL. Finally, in 1979, GAO issued an extended report titled: *The Davis-Bacon Act Should Be Repealed*.<sup>23</sup> The report touched off heated debate in labor policy circles and sparked several congressional hearings on the Davis-Bacon Act. While Congress took no direct legislative action, administrative restructuring was proposed—first by the Carter Administration and, subsequently (and in different form), by the Reagan Administration. Extended litigation followed—the controversy continuing beyond the end of the 20<sup>th</sup> century.<sup>24</sup>

At least since the 1979 GAO report, debate has been ongoing over the economic impact of the Davis-Bacon Act: an issue that remains unresolved. Other aspects of the administration of the statute that have been of continuing dispute include the DOL's ability, appropriately, to render prevailing wage rate determinations; the definition of basic concepts associated with the statute such as the *site of the work* and *helper*; and the application of the act to the various program statutes involving federal funding and certain funding mechanisms where there is a federal presence.<sup>25</sup>

## The Walsh-Healey Public Contracts Act (1936)

"The Government," stated Secretary of War Newton Baker in August 1917, while considering the production of military uniforms, "cannot permit its work to be done under sweatshop conditions, and it cannot allow the evils widely [associated with such production] ... to go uncorrected."<sup>26</sup> Government contracts for goods had long sparked complaints of abuse. Profiteering on sales to the federal government had been a continuing focus of public policy debate. During World War I, reformers battled to protect workers on the home front from exploitation.<sup>27</sup> After the war, wartime cooperation with labor faded before a reluctance, in peacetime, to interfere with labor practices of the private sector.

Compelled "to accept the lowest responsible bid regardless of the conditions of work under which the contract was performed," government often found itself "an unwilling collaborator with ... firms that sought to get government business by cutting wages."<sup>28</sup> In the early 1930s, the Roosevelt Administration, staffed heavily by social activists from the World War I era and faced with the economic realities of the Great Depression, began to press for reforms. In June 1933,

<sup>23</sup> U.S. General Accounting Office, *The Davis-Bacon Act Should Be Repealed: Report to the Congress by the Comptroller General of the United States*, GAO/HRD-79-18, April 27, 1979.

<sup>24</sup> For an overview of the history of the Davis-Bacon Act, see CRS Report 94-408, *The Davis-Bacon Act: Institutional Evolution and Public Policy*, by William G. Whittaker.

<sup>25</sup> *Inter alia*, see Herbert R. Northrup, "The 'Helper' Controversy in the Construction Industry," *Journal of Labor Research*, fall 1992, pp. 1-15; William A. Isokait, "Reason Restored: Courts Rule Davis-Bacon Act Language Means What It Says," *The Constructor*, August 1994, pp. 20-22; U.S. General Accounting Office, *Davis-Bacon Act: Process Changes Could Raise Confidence That Wage Rates Are Based on Accurate Data*, GAO/HEHS-96-130, May 1996; and U.S. General Accounting Office, *The Davis-Bacon Act: Labor Now Verifies Wage Data, but Verification Process Needs Improvement*, GAO/HEHS-99-21, January 1999.

<sup>26</sup> Quoted in Eileen Boris, *Home To Work: Motherhood and the Politics of Industrial Homework in the United States* (Cambridge: Cambridge University Press, 1994), p. 135.

<sup>27</sup> See Steven Fraser, *Labor Will Rule: Sidney Hillman and the Rise of American Labor* (New York: The Free Press, 1991), p. 166 ff.

<sup>28</sup> Herbert C. Morton, *Public Contracts and Private Wages: Experience under the Walsh-Healey Act* (Washington: The Brookings Institution, 1965), p. 8. (Hereafter cited as Morton, *Public Contracts and Private Wages*.)

Congress passed the National Industrial Recovery Act (NIRA) under which industries, given limited anti-trust immunity, developed codes of fair competitive practices which, normally, included minimum wage and overtime pay requirements, restriction of industrial homework, and prohibition of child labor.<sup>29</sup> The result was a flurry of quasi-regulatory activity—with high visibility and extreme contentiousness.<sup>30</sup> In May 1935, the NIRA was declared unconstitutional.<sup>31</sup>

## Walsh-Healey Enacted

The Roosevelt Administration set out to salvage what it could of the labor standards provisions of the NIRA. The approach taken under Davis-Bacon (i.e., regulation through procurement policy, rather than direct restraint upon the private sector) seemed a likely option. Anticipating a Court threat to the NIRA, Labor Secretary Frances Perkins had drafted (but temporarily set aside) two separate bills. One proposed establishment of labor standards under federal contracts for manufactured goods. The second would emerge in mid-1938, after considerable modification, as the Fair Labor Standards Act.<sup>32</sup>

The thrust of the public contracts legislation, reverting to the spirit of World War I reforms, was the eradication of sweatshop production: ending child labor and industrial homework, while establishing a minimum wage floor and overtime pay standards. Legislation mandating labor standards in contract production of goods for the federal government was introduced by Senator David Walsh (D-Mass.) in June 1935. A slightly different proposal was offered by Representative Arthur Healey (D-Mass.). A year later (June 1936), after extended hearings, the Walsh-Healey legislation was enacted (P.L. 74-846).<sup>33</sup>

In some ways, Walsh-Healey resembled Davis-Bacon.<sup>34</sup> It mandated that any contract “made and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia ... for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding \$10,000,” shall include a stipulation for payment to:

... all persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract ... without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries

<sup>29</sup> Margaret H. Schoenfeld, “Analysis of the Labor Provisions of the N.R.A. Codes,” *Monthly Labor Review*, March 1935, pp. 574-603. See also Irving Bernstein, *A Caring Society: The New Deal, the Worker, and the Great Depression* (Boston: Houghton Mifflin Company, 1985).

<sup>30</sup> On this period, see Hugh S. Johnson, *The Blue Eagle from Egg to Earth* (New York: Greenwood Press, 1968), and Donald R. Richberg, *The Rainbow* (New York: Doubleday, Doran & Company, Inc., 1936).

<sup>31</sup> *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

<sup>32</sup> Frances Perkins, *The Roosevelt I Knew* (New York: Viking Press, 1946), pp. 246-267; and George Martin, *Madam Secretary, Frances Perkins* (Boston: Houghton Mifflin Company, 1976), pp. 103-121. Where ideas are flowing as freely as they were during the New Deal, it can be difficult firmly to assign credit or responsibility.

<sup>33</sup> Concerning the early Walsh-Healey Act, see Elizabeth Brandeis, “Organized Labor and Protective Labor Legislation,” in Milton Derber and Edwin Young, eds., *Labor and the New Deal* (Madison: University of Wisconsin Press, 1961), pp. 208-210; and Carroll L. Christenson and Richard A. Myren, *Wage Policy Under the Walsh-Healey Public Contracts Act: A Critical Review* (Bloomington: Indiana University Press, 1966), p. 228.

<sup>34</sup> Charles Donahue, “The Davis-Bacon Act and the Walsh-Healey Public Contracts Act: Comparison of Coverage and Minimum Wage Provisions,” *Law and Contemporary Problems*, spring 1964, pp. 488-513.

currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract; ...<sup>35</sup>

The act required the contractor to be “the manufacturer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract.” The intent was to assure that the contractor was an actual (“regular”) “dealer” or “manufacturer” and not a bid broker.<sup>36</sup> The provision would later be altered. (See discussion of this provision below.)

Given its experience with Davis-Bacon and the NIRA, Congress seems to have been more concerned with detail in drafting Walsh-Healey. It set workhours limits of 8 hours per day and 40 hours per week—subsequently modified to provide for a general 40-hour workweek.<sup>37</sup> Child labor would be precluded: “no male person under sixteen years of age and no female person under eighteen years of age” could be employed on covered work.<sup>38</sup> No convict labor was to be employed in work covered by Walsh-Healey.<sup>39</sup> Congress mandated that covered work was to be performed in buildings that were safe, sanitary, and without hazard “to the health and safety of employees engaged in the performance of said contract” in an effort to thwart sweatshop production and industrial homework.<sup>40</sup>

There were limitations on the act’s coverage. Specifically, it would not apply with respect to goods that “may usually be bought in the open market” (i.e., that are not manufactured under contract for the federal government). In keeping with other legislation of the period, Walsh-Healey did not apply to agriculture: “to perishables, including dairy, livestock and nursery products, or to agricultural or farm products processed for the first sale by the original producers ....”<sup>41</sup> Similarly, common carriers of freight or personnel were exempt.<sup>42</sup>

Like Davis-Bacon, it provided that the Comptroller General should compile and circulate “to all agencies of the United States” a list of firms that “have breached any of the agreements or representations required by this Act” and permitted debarment of such firms for three years.<sup>43</sup>

The act left latitude to the Secretary of Labor. *First*. Should the Secretary find that compliance with the labor standards provisions of the act would “seriously impair the conduct of Government business,” he “shall make exceptions in specific cases or otherwise when justice or public interest will be served thereby.” *Second*. The Secretary is granted the option, through rules and regulations, of “allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this Act ....”<sup>44</sup>

<sup>35</sup> Section 1(b) of P.L. 74-846; currently Title 41 U.S.C. Section 35(b).

<sup>36</sup> Section 1(d) of P.L. 74-846.

<sup>37</sup> Section 1(c) of P.L. 74-846.

<sup>38</sup> See order of Secretary of Labor Louis Schwellenbach, August 24, 1945, in *Federal Register*, August 25, 1945, p. 10438.

<sup>39</sup> An exception was made with respect to the federal prison industries program. See Section 8 of P.L. 74-846.

<sup>40</sup> The act also reads, “Compliance with the safety, sanitary, and factory inspection laws of the State in which the work or part thereof is to be performed shall be prima-facie evidence of compliance with this subsection.” Section 1(e) of P.L. 74-846; Title 41, Section 35(e).

<sup>41</sup> Section 9 of P.L. 74-846.

<sup>42</sup> *Ibid*.

<sup>43</sup> Section 3 of P.L. 74-846.

<sup>44</sup> Section 6 of P.L. 74-846. Whatever alteration may be made to the overtime pay requirements of the act, the principle of time-and-a-half for overtime work had to be retained.

## Determining a Wage Standard

Although covered workers were to be paid “not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages,” it was not specified how the Secretary was to make such a determination. Nor were either “prevailing” or “minimum” defined.<sup>45</sup> As a result, there appears to have been some variation both of a working definition and of wage rate determination methodology from one Secretary to the next.

In 1952, the act was amended making it subject to the Administrative Procedure Act, specifying that rate determinations were to be made “on the record after opportunity for a hearing.” Further, it provided that “any interested person shall have the right of judicial review of any legal question which might otherwise be raised, including, but not limited to, wage determinations and the interpretation of the terms ‘locality,’ ‘regular dealer,’ ‘manufacturer,’ and ‘open market.’”<sup>46</sup> The result of instituting judicial review would not be long in coming.

Rendering prevailing wage rate determinations, as suggested above, was not easy. The act left undefined critical concepts. But practical issues would overwhelm the theoretical and most would be dealt with by the Department at its own discretion. Should all firms be canvassed for prevailing wage purposes? DOL would choose a cutoff at five, 10, 20 employees—whatever seemed appropriate at the time; but the size of the firms surveyed could have a significant impact upon the survey findings. Which firms might be grouped together for survey purposes? What would be an appropriate payroll period: that is, at what point during the production cycle should the survey be conducted? Which employees should be taken into account and, in terms of job description, how should they be differentiated one from the other? (Unlike Davis-Bacon, workers covered by Walsh-Healey were not distinguishable along craft lines—for the most part.) Should there be sub-minima for beginners, learners, apprentices, etc., or should all workers be treated similarly?<sup>47</sup>

The actual wage survey was undertaken by the Bureau of Labor Statistics (BLS). When conducting surveys of manufacturing establishments to establish a database, BLS worked under a promise of firm-specific confidentiality. Thus, as a practical matter, affected firms saw only the general tabulations and not the data upon which they were based and, therefore, had no way to judge the validity of the Department’s calculations. As a result, its methodology was subjected to judicial challenge.<sup>48</sup>

In the 1964 case of *Wirtz v. Baldor Electric Co.*, the court reviewed the wage determination process as utilized by DOL and suggested that the Department could sustain the confidentiality of

<sup>45</sup> Initially, Walsh-Healey wage rate determinations were made for the low-wage industries, largely textile and garments; but, by the early 1960s, the Secretary had shifted focus to a new tier of medium to high-wage industries. At least partly as a result of this shift of focus, industry became increasingly critical of the statute and of its administration by DOL. Rudolf Modley, James R. Patton, Jr., and Gerald D. Reilly, “Problem Child Among Labor Laws—The Walsh-Healey Act,” *Duke Law Journal*, spring 1963, pp. 206-210, state that “no wage determinations were made between mid-1943 and 1948.” (Hereafter cited as Modley, et al., *Problem Child*.)

<sup>46</sup> See Title III, Section 301, of P.L. 82-429. To meet the locality requirement, state Modley, et al., in *Problem Child*, p. 247, the Secretary had divided “the entire United States into six ‘localities,’” on the legality of which the courts were divided. See *Lukens Steel Co. v. Perkins*, 107 F.2d 627, 630 (D.C. Cir. 1939) and *Perkins v. Lukens Steel Co.* 310 U.S. 113 (1940). The U.S. Supreme Court held that *Lukens Steel* was without standing to sue—one of the cases leading to the 1952 (Fullbright) amendment to the act. See P.L. 82-429, Title III, Section 301.

<sup>47</sup> Modley, et al., *Problem Child*, pp. 221-232.

<sup>48</sup> *Ibid.*, p. 233, states, “The confidentiality clause effectively prevents industry, labor, and all Labor Department personnel (except BLS employees) from having access to the data underlying the wage survey.”

the survey data but, at the same time, it risked having its determinations invalidated.<sup>49</sup> The court found tabulations of wage rates “compiled from undisclosed confidential data ... failed to accord to appellees [industry] the adequate opportunity for rebuttal and cross-examination that the Congress prescribed” under the Walsh-Healey Act as amended in 1952.<sup>50</sup> And, the court found that the Secretary’s wage rate determination methodology “must be set aside for the further reason that it is not supported by ‘reliable, probative, and substantial evidence.’”<sup>51</sup>

In the wake of *Wirtz v. Baldor Electric*, no further Walsh-Healey wage rate determinations were made. As a result, the “prevailing minimum” wage for Walsh-Healey purposes has become the federal minimum wage under the Fair Labor Standards Act (FLSA).

## The Issue of Overtime Pay

Establishment of an 8-hour day had been a concern of organized labor at least since the late 19<sup>th</sup> century—and it had been one of the labor standards addressed in the industrial codes growing out of the NIRA. Thus, in 1936, it was consistent both with history and the spirit of the times that the authors of the Walsh-Healey Act provided that covered workers should not be permitted to work “in excess of eight hours in any one day or in excess of forty hours in any one week.”

However, P.L. 74-846 granted the Secretary discretion in dealing with workhours and affirmed: “Whenever the Secretary ... shall permit an increase in the maximum hours of labor stipulated in the contract, he shall set a rate of pay for any overtime, which rate shall be not less than one and one-half times the basic rate received by any employee affected.”<sup>52</sup> Under the original Walsh-Healey language, the Secretary could set aside the 8-hour and 40-hour standards—but only in so far as payment of time-and-a-half for hours worked in excess of 8 per day and 40 per week was granted.

Both Walsh-Healey and the Fair Labor Standards Act (FLSA) were rooted in the NIRA. Introduced in 1937 before Walsh-Healey was fully implemented, the FLSA was signed into law in mid-1938 (P.L. 75-718). In the latter enactment, Congress dropped the daily limit on hours of work (pre-overtime) but ultimately kept a weekly standard. The FLSA permitted any combination of hours of work to which an employer would agree so long as the total did not exceed 40 hours in a single workweek—after which overtime rates would have to be paid.<sup>53</sup>

At least by the late 1960s, some in industry were pointing to a conflict between the overtime pay requirements of Walsh-Healey and those of the FLSA. It created scheduling problems, it was argued, where firms were engaged both in private sector (FLSA-covered) work and in contract production for the federal government. On the other hand, certain worker groups, consultants, and women’s groups were urging greater flexibility in work scheduling. In 1978, Congress adopted the Federal Employee’s Flexible and Compressed Work Schedules Act (P.L. 95-390). The latter statute, at first experimental and subsequently established on a permanent basis, allowed federal agencies to schedule hours of work over a two-week 80-hour period without payment of overtime rates. This program for federal employees (on which the trade unions were divided) raised a

<sup>49</sup> *Wirtz v. Baldor Electric Co.* 337 F.2d 518 (D.C. Cir. 1964).

<sup>50</sup> 337 F.2d at 529.

<sup>51</sup> *Ibid.*, p. 530. See unnumbered CRS report, *Prevailing Minimum Wages under the Walsh-Healey Act*, by Vincent E. Treacy, no longer in circulation but available to congressional clients from the author of this report upon request.

<sup>52</sup> Section 6 of P.L. 74-846.

<sup>53</sup> Under P.L. 75-718, the workweek was initially set at 44 hours, prior to the overtime pay requirement, but was to be phased down to a 40-hour standard at the end of a two-year period. Special requirements and exceptions were also built into the act.



question of equality of treatment of public and private sector workers and provoked new demands for amendment of Walsh-Healey.

Finally, as part of the National Defense Authorization Act for FY1986 (P.L. 99-145), Congress amended both Walsh-Healey and the Contract Work Hours and Safety Standards Act (which supplements the Davis-Bacon Act) by eliminating the 8-hour daily pre-overtime pay requirements as they applied to federal contract work. The 8-hour provision was replaced by the 40-hour standard of the FLSA. The measure was signed by President Ronald Reagan on November 8, 1985.<sup>54</sup>

### *Manufacturer or Regular Dealer*

As noted above, federal procurement had witnessed the presence of *bid brokers*: professional bidders on public contracts who may, in fact, have possessed no independent ability to produce the deliverables specified in the contract. Once award had been made, the bid broker would market the work to a third party—to the contractor who could do the work most cheaply and perhaps accept a less than average profit.<sup>55</sup> In order to end such practices, Section 1(a) of the original Walsh-Healey Act provided that an eligible contractor had to be “the manufacturer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract ....”

The concepts of “manufacturer” and “regular dealer” (determining eligibility as a federal contractor under the act) came to be set forth in DOL regulations. A *manufacturer* was defined as “a person who owns, operates, or maintains a factory or establishment that produces on the premises the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.” Similarly, a *regular dealer* was identified as one “who owns, operates, or maintains a store, warehouse, or other establishment in which the materials ... described by the specifications and required under the contract are bought, kept in stock, and sold to the public in the usual course of business.” The rules specified how eligibility determinations were to be made.<sup>56</sup>

During the 103<sup>rd</sup> Congress, the law was changed (P.L. 103-355). The mandatory character of the “manufacturer” and “regular dealer” eligibility test was altered. Instead, a new section was added which provides that the Secretary of Labor “*may prescribe* in regulations the standards for determining whether a contractor is a manufacturer of or a regular dealer in materials” and other articles to be used in the performance of a contract covered by Walsh-Healey. (Italics added.) Adherence to the “manufacturer” and “regular dealer” standards, thus, became a matter of discretion with DOL.<sup>57</sup>

<sup>54</sup> For further discussion of the demise of the 8-hour standards for federal contract work, see CRS Report 86-33, *The Walsh-Healey Public Contracts Act of 1936 and the Issue of Overtime Pay: Proposals of the 99<sup>th</sup> Congress with Background Perspectives*, by William G. Whittaker, pp. 51-62 (archived: available to congressional clients from the author by request).

<sup>55</sup> Herbert Morton, in *Public Contracts and Private Wages*, pp. 12-13, characterizes the bid broker as “a fly-by-night operator who had no plant of his own, but who secured government contracts and then farmed the work out at a profit.” The “bid peddler” or “bid broker,” Morton noted, might be little more than a one-person operation. It is also possible that reputable firms might bid at cost or even under cost in order to provide interim work for their employees—thus holding a crew together pending a more favorable deal. Such work could also provide entry into the field.

<sup>56</sup> See 41 C.F.R. § 50-201.101(a)(1) & (2), and 41 C.F.R. § 50-206.50.

<sup>57</sup> See *Federal Register*, August 5, 1996, pp. 40714-40716.

## Naval Vessels

Initially, there seems to have been some dispute as to whether the “construction, alteration, furnishing, or equipping of a naval vessel” was construction subject to the Davis-Bacon Act or the purchase of goods covered by the Walsh-Healey Act. Under naval procurement law (Title 10, Section 7299), naval vessels fell under Walsh-Healey.

However, the Federal Acquisition Streamlining Act of 1994 (P.L. 103-355) repealed Title 10, Section 7299. While this change in the law “required no changes in the regulations,” DOL stated:

... the Department advised contracting agencies and contractors that such contracts would, as a result, be subject to the Davis-Bacon Act, which applies to contracts in excess of \$2,000 for the construction, alteration, and/or repair ... of a public building or a public work, because marine vessels have historically been regarded as “public works” for purposes of the Davis-Bacon Act.

In a *Federal Register* notice, the Department noted objections to its interpretation (placing vessels under Davis-Bacon).<sup>58</sup> In rulemaking, both the Department of the Navy and the Shipbuilders Council of America “questioned the Department’s interpretation” that, in the absence (here, the repeal) of Section 7299, labor standards coverage would devolve to Davis-Bacon. DOL conceded that the result (devolution) “may have been an unintended consequence” of P.L. 103-355 but, nonetheless, found the issue moot. The Fiscal Year 1996 Department of Defense Authorization Act (P.L. 104-106), it pointed out, “includes a provision reinstating former 10 U.S.C. 7299.” Therefore, the Department concluded: “... each contract for the construction, alteration, furnishing or equipping of a naval vessel is once again subject to the PCA [Walsh-Healey], unless the President determines that this requirement is not in the interest of national defense.”<sup>59</sup>

## The McNamara-O’Hara Service Contract Act (1965)

As the 1960s dawned, the FLSA was still evolving. Wide gaps in coverage remained—including many service employees. And, although Congress had mandated minimum wage standards, variously calculated, for construction and manufacturing workers employed in contract work for the federal government, the service sector was not covered by these standards. Legislation to fill that void was offered during several Congresses and, during the 88<sup>th</sup> Congress (1963-1964), hearings were held and a bill reported from the House Committee on Education and Labor.<sup>60</sup> The measure died in the Rules Committee.

### McNamara-O’Hara Enacted

In 1965, with support from the Johnson Administration, Representatives Tom Pelly (R-Wash.) and James O’Hara (D-Mich.) introduced new legislation to protect service workers. “The employees who would be covered by the proposed legislation are among the most poorly paid and economically deprived in our society,” explained DOL Solicitor Charles Donahue during hearings in August 1965. “Often,” he continued, “they are not members of unions and have little prospect of bettering their condition through collective bargaining.” He argued that the federal government should provide an example of fairness and justice. “While I do not wish to imply that

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<sup>58</sup> Ibid., p. 40714.

<sup>59</sup> Ibid., p. 40715. In terms of minimum wages (likely moot, itself, for ship construction) and overtime pay, the impact of restoration of the Walsh-Healey Act might be regarded as redundant since such work would otherwise be covered by the identical requirements of the FLSA.

<sup>60</sup> U.S. Congress, House Committee on Education and Labor, Special Subcommittee on Labor, *Service Contracts Act of 1963*, hearings, 88<sup>th</sup> Cong., 2d Sess., January 27, 29, 30, and March 16, 1964.



low-wage rates are universal in the service industry,” the Solicitor cautioned, “the fact that they exist at all is indefensible, particularly where Government contracts are involved.”

The Solicitor pointed both to economic and policy considerations in support of the Pelly-O’Hara proposals. Contracting agencies, he stated, must “award contracts to the lowest bidder who can satisfactorily complete the work. Since labor costs are the predominant factor in most service contracts,” he added, “the odds on making a successful low bid for a contract are heavily stacked in favor of the contractor paying the lowest wage.” When the “low bid policy” for service contracts “is coupled with a policy of no labor standards protection,” Donahue observed, “the trend may well be in certain areas for wage rates to spiral downward.”

In the view of the Johnson Administration, low wages were not a prudent economy. “... it is very doubtful whether the Government gains in the long run by a policy which encourages the payment of wages at or below the subsistence level. Substandard wages,” Donahue affirmed, “must inevitably lead to substandard performance. Further, the economy as a whole suffers from the reduced purchasing power of the workers.” He concluded: “The present policy of low bid contract awards is one under which everyone loses—the employee, the Government, the responsible contractor—that is, everyone except the fly-by-night operator who is eager to profit from the under compensated toil of his workers.”<sup>61</sup>

Although differing opinions were expressed concerning coverage and the wage rate determination process, the legislation appears to have generated little controversy. The Pelly-O’Hara bill was unanimously reported from the House Committee on Education and Labor and on September 20, 1965, passed by the House under suspension with a voice vote.<sup>62</sup> Three days later, following a brief hearing by the Senate Subcommittee on Labor, chaired by Senator Patrick McNamara (D-Mich.), the measure was unanimously reported from the full Committee on Labor and Public Welfare. On October 1, 1965, the bill (now, McNamara-O’Hara) was passed by the Senate virtually without debate.<sup>63</sup> In signing the legislation on October 22, 1965, President Lyndon Johnson observed that it “closes the last big gap” in labor standards protection for federal contract workers (P.L. 89-286).<sup>64</sup>

## Evolution of the Service Contract Act

Like Davis-Bacon and Walsh-Healey, the McNamara-O’Hara Service Contract Act is bid-based. It provides that every contract (and bid specification therefore) “entered into by the United States or the District of Columbia in excess of \$2,500 ... [with certain exceptions specified in the act], whether negotiated or advertised, *the principal purpose of which* is to furnish services in the United States through the use of service employees,” shall contain certain labor standards provisions. (Italics added.) Among these were:

<sup>61</sup> U.S. Congress, House Committee on Education and Labor, Special Subcommittee on Labor, *Service Contract Act of 1965*, hearing, 89<sup>th</sup> Cong., 1<sup>st</sup> Sess., August 5, 1965, pp. 3-13.

<sup>62</sup> *Congressional Record*, September 20, 1965, pp. 24386-24388. See U.S. Congress, House Committee on Education and Labor, *Service Contract Act of 1965*, report to accompany H.R. 10238, 89<sup>th</sup> Cong., 1<sup>st</sup> sess., H.Rept. 89-948 (Washington, GPO, 1965), 5 p. (Hereafter cited as *House Report 89-948*.)

<sup>63</sup> *Congressional Record*, October 1, 1965, pp. 25857-25858. See U.S. Congress, Senate Committee on Labor and Public Welfare, *Service Contract Act of 1965*, report to accompany H.R. 10238, 89<sup>th</sup> Cong., 1<sup>st</sup> sess., S.Rept. 89-798 (Washington, GPO, 1965), 6 p. (Hereafter cited as *Senate Report 89-798*.)

<sup>64</sup> *Public Papers of the Presidents of the United States: Lyndon B. Johnson*, Book II, Washington, U.S. Govt. Print. Off., 1966, pp. 1078-1079.

- ... that not less than a specified minimum wage, “determined by the Secretary” to be “in accordance with prevailing rates” for comparable work “in the locality,” be paid to workers employed under the said contract—but in no case less than the minimum wage provided for in the FLSA,
- that workers under the contract be provided the fringe benefits (or the cash equivalent thereof) found by the Secretary to be prevailing for such workers engaged in comparable work in the locality;<sup>65</sup>
- that the workplace be safe and sanitary; and
- that the Secretary was permitted to adjust the terms of the statute as he might deem proper “in the public interest or to avoid serious impairment of the conduct of Government business.”

It was expected that contract service employees were to be paid overtime rates, where appropriate, on the basis of the regular rate as determined under the FLSA.

But, what exactly was a *service employee*? The original McNamara-O’Hara Act (P.L. 89-286) defined a service employee to include the following:

... guards, watchmen, and any person engaged in a recognized trade or craft, or other skilled mechanical craft, or in unskilled, semiskilled, or skilled manual labor occupations; and any other employee including a foreman or supervisor in a position having trade, craft, or laboring experience as the paramount requirement ....

It was not clear that every worker engaged in contract work, other than construction or in manufacturing, would be deemed a service worker; but, there did seem to be a consensus that the three acts, taken together, would cover the field of contract work.

## Controversy and Amendment

Though the concept of the Service Contract Act (SCA) may have been clear, problems quickly arose as DOL commenced its implementation. As with Davis-Bacon, many of these complications stemmed from the absence of a more precise definition of terms used in the new statute. In 1972 and again in 1976, the act was amended, generally: (a) to expand coverage, (b) to improve administrative efficiency, (c) to help assure that the act would be enforced, and (d) to encourage greater stability within the service industry. But a primary focus of the various amendments was to define the terms of coverage.

### *The 1972 Amendments*

After several years of experience, both employers and service workers seemed convinced that change in the statute was in order. Further, some Members of Congress—involved in the original enactment—expressed concern that implementation of the statute was not proceeding as they had expected. The legislation (P.L. 92-473), some estimated, would “benefit nearly two million employees of private service contractors on Federal installations.”<sup>66</sup>

*The “Five Man” Provision.* Generally following the Walsh-Healey language, the SCA permitted the Secretary to make “such rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this Act as he may find necessary and proper ....” It also provided, apparently as a fall-back position, that not less than the minimum wage under the

<sup>65</sup> In P.L. 88-349, adopted a year earlier, Congress had added a fringe benefit component to the Davis-Bacon prevailing wage rate calculation.

<sup>66</sup> “Service Contracting Reform Bill Signed,” *The Laborer*, November 1972, p. 3.

FLSA should be paid to covered workers. The intent of the provisions seems to have been to provide flexibility and to allow the Secretary time to develop a suitable wage rate determination methodology and machinery.

During hearings in 1971 and 1972, it was disclosed that the Secretary, to a significant degree, had failed to make the requisite determinations and was relying upon the FLSA minimum wage as the locally prevailing rate for SCA purposes. Thus, Congress amended the act to require that the Secretary would actually make wage rate determinations for progressively smaller contracts. After July 1, 1976, they were to be made for “all contracts under which more than five service employees are to be employed.”<sup>67</sup>

*“Successorship” and Related Requirements (1972).* In service contracts, labor cost is often a primary competitive element, with the workers, over time, likely to secure some improvement in wage and benefit levels. Thus, with each successive round of bidding, a competitor contractor, coming fresh to the job, would be almost certain to present a bid lower than that of a current contract holder based simply on lower wage and benefit rates. Where a contracting firm operated under a collective bargaining agreement, its displacement would be almost guaranteed—regardless of the quality of services provided.

The implications, it was argued, were diverse. *First.* Wage-based competition resulted in a downward spiral so long as there were cheaper workers available. *Second.* Annual shifts in contractors created a lack of continuity and stability within the industry. *Third.* Low wages produced no real economy for government or the consumer since (a) cheaper workers were often less competent and responsible than more experienced and more highly paid workers and, (b) the annual rotation of contractors created an employer incentive to maximize profits for the short-term—with little thought for quality of performance. *Fourth.* Since service workers were, arguably, usually on the lower end of the pay scale even where prevailing scales were honored, they might pose a welfare burden to the community. And, were they displaced in a shift of contractors, the workers might be left destitute. *Fifth.* An annual change of contractors, if only because of the short duration of service, seemed to guarantee a non-union work environment.

As modified, the act would require that a successor contractor, for substantially the same services in a locality, could not pay “any service employee ... less than the wages and fringe benefits” (including prospective increases resulting from “arm’s length negotiations”) to which he or she would have been entitled under the predecessor contract.<sup>68</sup>

The provision was contentious. Although the Secretary was granted authority to modify a contract if he found, after a hearing, that the wage and benefit rates were “substantially at variance” with those prevailing locally for similar services, the provision seemed, some argued, unduly to favor workers. Absent a discretionary intervention by the Secretary, wages and benefits would be unlikely to fall, downward economic pressures notwithstanding. Conversely, it could be argued,

<sup>67</sup> P.L. 92-473. The result was a dual coverage threshold for wage rate determinations: i.e., contracts in excess of \$2,500 and with “more than” five service workers employed. See CRS Report 86-533, *The McNamara-O’Hara Service Contract Act: Discretionary Authority of the Secretary of Labor Under Section 4(b) and the Mandatory Wage Rate Determination Requirement as Developed in the 1972 Amendments, A Legislative History*, by William G. Whittaker (out of print, but available to congressional clients from the author by request).

<sup>68</sup> The predecessor contract, now setting a wage/benefit floor for a successor contractor, had to result from “arm’s length negotiations.” That is, there could not have been collusion between a predecessor contractor and his workers (or the union) to raise the wage/benefit level in order to saddle a successor with uneconomic costs.

the requirement would somewhat remove wages and benefits from the competitive mix, encouraging employers to compete in other ways.<sup>69</sup>

*Other Issues.* Concern had been expressed that direct federal employees could be disadvantaged through contracting out under potentially less costly service contracts. To insure comparability, Congress added language to the statute to provide: that each such service contract must contain a “statement of the rates that would be paid by the federal agency to the various classes of service employees” if the workers were direct federal employees; and, that the Secretary “shall give due consideration to such rates” in making wage and fringe benefit determinations. Finally, subject to any appropriations restraints, service contracts could be negotiated for up to five years rather than on an annual basis.

### ***The 1976 Amendments***

Interpretive questions continued to plague the act in the wake of the 1972 amendments. Coverage and definitional issues soon emerged. How far did the Service Contract Act reach? Was coverage confined to janitors, cleaning staff and immediately related workers; or, did it include white collar and technical workers as well?

The act was not self-enforcing and some agencies, it was charged, let contracts without requesting wage rate determinations.<sup>70</sup> Indeed, an informal coalition may also have developed between procurement officers and contractors, each for their own purposes, seeking to reduce labor costs and, thus, seeking the narrowest possible interpretation of coverage. When agencies disagreed, industry and labor were left without direction—and disputes ultimately ended up in the courts.

When the courts ruled that the act was limited in its scope to blue collar employees,<sup>71</sup> Congress reviewed the coverage issue in a series of hearings conducted intermittently through 1974, 1975 and 1976. The House Subcommittee on Labor-Management Relations reported as its intent that white collar workers (clerical workers along with “keypunch operators and others”) were to be included under the terms of the SCA—and, that their inclusion had been the intent of Congress.<sup>72</sup> During the fall of 1976, legislation to clarify that point (though intentionally worded in terms that would not be delimited by collar color) moved through Congress, becoming law in October 1976 (P.L. 94-489).<sup>73</sup>

The definition of *service employee*, as might have been anticipated given the history of these statutes, was not entirely clarified by the 1976 amendments. Whatever the intent of Congress may have been, contract workers engaged in “the maintenance, calibration, and/or repair of ... automatic data processing equipment and office information/word processing systems,” and

<sup>69</sup> See Armand J. Thieblot, Jr., *Prevailing Wage Legislation: the Davis-Bacon Act, State “Little Davis-Bacon” Acts, the Walsh-Healey Act, and the Service Contract Act* (Philadelphia: The Wharton School, University of Pennsylvania, 1986, pp. 254-257. (Hereafter cited as Thieblot, *Prevailing Wage Legislation*.)

<sup>70</sup> See Beverly Hall Burns, “The Service Contract Act of 1965: Time To Revise or Repeal,” *Villanova Law Review*, April 1984, p. 443.

<sup>71</sup> See *Descomp v. Sampson*, 377 F.Supp. 254 (D.Del. 1974) and *Federal Electric Corporation v. Dunlop*, 419 F.Supp. 221 (M.D. Fla. 1976).

<sup>72</sup> U.S. Congress, House Committee on Education and Labor, *Service Contract Act Amendments of 1976*, report to accompany H.R. 15246, 94<sup>th</sup> Cong., 2<sup>nd</sup> sess., H.Rept. 94-1571 (Washington, GPO, 1976), pp. 2-3.

<sup>73</sup> The operative language of P.L. 94-489 read: “The term ‘service employee’ means any person engaged in the performance of a contract entered into by the United States ... whether negotiated or advertised, *the principal purpose of which* is to furnish services in the United States (other than any person employed in a bona fide executive, administrative, or professional capacity) ....” Italics added.

related technical workers, would come to be exempt from Service Contract Act coverage. The exemptions, the Secretary of Labor found, “are necessary and proper in the public interest or to avoid serious impairment of the conduct of Government business ....”<sup>74</sup>

Still other definitional issues proved contentious. What was implied by the concept of *principal purpose*? What would be the status of service employees, however numerous, under a contract the principal purpose of which was not to provide services? How should administrative or professional personnel, who also provide services, be treated? “This employee mixture,” one observer affirmed, “subjects the contract to the ‘incidental use’ test,” which he suggested was “a confusing ‘guideline.’”<sup>75</sup>

After the 1976 amendments, further refinement of the act was left, largely, to administrative rulemaking, to litigation, and to initiatives in the area of procurement reform. That course, however, would not be smooth.<sup>76</sup>

## Comparison of Existing Standards

Through the years, each act—Davis-Bacon, Walsh-Healey, and McNamara-O’Hara—has been intermittently a focus of attention, most often sparked by critics. To some extent, the controversy surrounding each of these statutes may be a measure of its impact.

Judged by the literature it has sparked and the frequency with which it has been an active part of the legislative agenda, the Davis-Bacon Act (1931) has been the most controversial of the three.<sup>77</sup> At least two factors may be at work here. *First*. There are strong and articulate interest groups both defending and opposing the Davis-Bacon Act. *Second*. Aside from the act, per se, Davis-Bacon (prevailing wage) provisions have been included in numerous program statutes thereby expanding the impact of the act to groups of people (in government and in the contracting community) unfamiliar with its operation and requirements. As a result, when these program statutes have come up for review and/or reauthorization, Davis-Bacon is frequently called into consideration.

McNamara-O’Hara (1965) was a subject of contention during the 1970s and 1980s. However, it would appear that, following a strong attack by certain segments of industry and by the General Accounting Office, it has largely disappeared from the legislative agenda. It does, however, resurface during discussions of general procurement policy and has been a subject of administrative rulemaking.<sup>78</sup> While the Walsh-Healey Act (1936) may have been moderately controversial when it was adopted (and again in the 1950s and early 1960s), it appears to have been overshadowed by other more contentious New Deal statutes: for example, the Wagner-Connery Labor Relations Act (National Labor Relations Act, 1935) and the Fair Labor Standards

<sup>74</sup> See 29 C.F.R. § 4.123(e). See also Bureau of National Affairs, *Daily Labor Report*, February 6, 1984, pp. A11-A13 and D1-D6.

<sup>75</sup> Brian M. Kingston, “The Service Contract Act of 1965: A Review,” in *The Air Force Law Review*, vol. 20, no. 3 (1978), p. 288.

<sup>76</sup> See Thieblot, *Prevailing Wage Legislation*, pp. 229-270; and Joseph E. Kalet, *Primer on FLSA & Other Wage & Hour Laws* (Washington: Bureau of National Affairs, Inc., 1994), pp. 103-121.

<sup>77</sup> CRS Report 94-908, *Davis-Bacon: The Act and the Literature*, by William G. Whittaker.

<sup>78</sup> With respect to GAO, see U.S. General Accounting Office, *Service Contract Act Should Not Apply to Service Employees of ADP and High-Technology Companies*, GAO/HRD-80-102, September 16, 1980, 113 p.; and U.S. General Accounting Office, *The Congress Should Consider Repeal of the Service Contract Act*, GAO/HRD-83-4, January 31, 1983, 179 p.



Act (1938).<sup>79</sup> Perhaps because its minimum wage and overtime standards have become co-equal with those of the Fair Labor Standards Act, it seems to be no longer a focus of attention—neither legislative nor administrative.

## Diverse Provisions but Similarity of Purpose

Davis-Bacon was pre-New Deal and conceived prior to the Depression though enacted in 1931 as an economic stabilization measure. By 1936, when Congress took up the legislation that would become the Walsh-Healey Act, it had before it the experience with Davis-Bacon and, subsequently, with the National Industrial Recovery Act (NIRA). In each case (Davis-Bacon and Walsh-Healey), Congress acted in its role as consumer and carefully avoided extending labor standards to the private sector.

In 1937, judicial attitudes toward wage/hour legislation involving the private sector changed.<sup>80</sup> After decades of refusing to give constitutional sanction to labor standards regulation for the private sector, the Supreme Court modified its stance and seemed willing to allow Congress greater latitude in dealing with such issues. As a result, the FLSA was adopted in 1938. During consideration of the FLSA legislation, Congress seemed to focus on the experience with the NIRA. It was acutely aware of NIRA deficiencies—but that statute, through its demise, provided an indication of what the courts would accept. Now freer to deal directly with labor standards in the private sector, Congress was able to move beyond both Davis-Bacon and Walsh-Healey in crafting wage/hour legislation.<sup>81</sup>

The juxtaposition of McNamara-O'Hara (1965) and the expansion of the FLSA during the 1960s and 1970s is more puzzling. In reporting the initial legislation on McNamara-O'Hara, both the House and Senate committees noted that service employees “in many instances are not covered by the Fair Labor Standards Act or State minimum wage laws.”<sup>82</sup> The FLSA, beginning with a relatively narrow pattern of coverage, had gradually been extended to an ever wider segment of the workforce. However, the 1961 FLSA amendments expanded coverage “to about 3.6 million new workers ... primarily in the retail trades and the service sector” and, under the 1966 FLSA amendments, to about 9 million additional workers of whom perhaps 3.3 million were employed in education and service fields (for example, public and private hospitals and nursing institutions).<sup>83</sup> Congress might have established wage/hour standards for workers employed under federal service contracts by amending the FLSA. Instead, after an interval of nearly 30 years, it chose to revisit the federal contract labor standards field and to adopt a new statute (a supplement to Davis-Bacon and Walsh-Healey)—while, almost simultaneously, expanding the FLSA to provide protection for many of the same workers.

<sup>79</sup> Concerning policy priorities and public reaction during the period when the federal contracting labor standards statutes (except McNamara O'Hara) were being shaped, see Jerold S. Auerbach, *Labor and Liberty: The La Follette Committee and the New Deal* (Indianapolis: Bobbs-Merrill, 1966); and Irving Bernstein, *A Caring Society: The New Deal, the Workers, and the Great Depression* (Boston: Houghton Mifflin, 1985).

<sup>80</sup> The change in judicial attitude is explained in John W. Chambers, “The Big Switch: Justice Roberts and the Minimum-Wage Cases,” *Labor History*, winter 1969, pp. 44-73.

<sup>81</sup> Two more recent studies examine the context of enactment of the FLSA: George E. Paulsen, *A Living Wage for the Forgotten Man: The Quest for Fair Labor Standards, 1933-1941* (Selinsgrove: Susquehanna University Press, 1996); and Willis J. Nordlund, *The Quest for a Living Wage: The History of the Federal Minimum Wage Program* (Westport, Conn.: Greenwood Press, 1997).

<sup>82</sup> *House Report 89-948*, p. 2, and *Senate Report 89-798*, p. 3.

<sup>83</sup> Nordlund, pp. 108 and 115.

Thus, by the closing decades of the 20<sup>th</sup> century, two separate, distinct, but often parallel, federal wage/hour structures had been developed. Minimum wage and overtime pay protections were provided to most private and public sector workers through the FLSA. For construction workers, employed on federal contract work, there was a super-minimum wage (the locally prevailing rate) under the Davis-Bacon Act.<sup>84</sup> Service employees would similarly enjoy a super-minimum wage (not less than the locally prevailing standards) under the McNamara-O'Hara Act. And, in theory, workers engaged in the contract production of goods for the federal government would have to be paid not less than the locally prevailing minimum wage under the Walsh-Healey Act. At the same time, construction and service workers would have overtime pay protection under the Contract Work Hours and Safety Standards Act (1969)—initially more protective than the overtime pay requirements of the FLSA but, ultimately, co-equal with that statute.

The provisions of the various statutes have been modified through the years by acts of Congress. **Table 1** sets forth the contrasting (and, sometimes, overlapping) provisions of the FLSA and the federal contract labor standards statutes.

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<sup>84</sup> Construction workers had also been a focus of the 1966 FLSA amendments.



**Table 1. Compilation of Select Federal Labor Standards Requirements**

<b>Provision</b>	<b>Davis-Bacon</b>	<b>Walsh-Healey</b>	<b>McNamara-O'Hara</b>	<b>Work Hours and Safety Standards Act</b>	<b>Fair Labor Standards Act</b>
Type of work covered	Construction	Goods	Services	Construction	Most public and private sector workers
Coverage threshold	\$2,000	\$10,000	\$2,500	—	— <sup>a</sup>
Wage standard	Locally prevailing rate	Minimum wage under the FLSA (since 1964)	Locally prevailing minimum rate	— <sup>b</sup>	Statutory minimum wage <sup>c</sup>
Nature of payment	Cash wage with fringe benefit component	"... the prevailing minimum wages for persons employed on similar work ..." No further definition in statute	Cash wage with fringe benefit component	—	Cash wage only
Geographical coverage	Locality (normally a county)	Undefined <sup>d</sup>	Undefined <sup>e</sup>	— <sup>f</sup>	National
Emergency/Suspension	By the President in "a national emergency" <sup>g</sup>	By the Secretary of Labor when a provision "will seriously impair the conduct of Government business" or "in the public interest or to prevent injustice and undue hardship" <sup>h</sup>	No authority to suspend, per se <sup>i</sup>	— <sup>f</sup>	No authority to suspend
Pre-overtime hours of work	— <sup>j</sup>	40 hours	— <sup>k</sup>	40 hours	40 hours <sup>l</sup>
Debarment	three years	three years	three years	— <sup>f</sup>	Not applicable
Child labor	—	No male under 16 years of age and no female under 18 years of age may be employed	—	—	Regulates child labor by age and type of employment
Convict labor	—	No convict labor <sup>m</sup>	—	—	—

Provision	Davis-Bacon	Walsh-Healey	McNamara-O'Hara	Work Hours and Safety Standards Act	Fair Labor Standards Act
Industrial homework	—	Prohibited by inference <sup>a</sup>	Prohibited by inference <sup>a</sup>	—	The Secretary is authorized to regulate and/or to prohibit industrial homework <sup>p</sup>
Locality	"the city, town, village, or other civil subdivision of the State in which the work is to be performed"	"in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract ..."	Not defined in statute; subject to administrative and judicial determination	—	—

- a. There is no comparable threshold for coverage under the FLSA.
- b. No separate wage standard provided.
- c. A statutory minimum rate (\$5.85 per hour, to increase in steps to \$7.25 per hour in July 2009), but with variations for certain youth workers, persons with disabilities, and some specific occupations. Some exemptions have been written into the statute.
- d. Undefined in statute; now equal to the minimum wage under the FLSA: thus, national.
- e. Undefined in statute, but subject to the locality provisions of the act as defined through regulation.
- f. Not applicable: coverage is a supplement to Davis-Bacon coverage.
- g. The act provides (Title 40, Section 276a-5): "In the event of a national emergency the President is authorized to suspend" the act. The concept of "a national emergency" has not been defined.
- h. The act provides (Title 41, Section 40): "upon a written finding by the head of the contracting agency or department that the inclusion in the proposal or contract of the representations or stipulations set forth in section 35 of this title will seriously impair the conduct of Government business, the Secretary of Labor shall make exceptions in specific cases or otherwise when justice or public interest will be served thereby. Upon the Joint recommendation of the contracting agency and the contractor, the Secretary of Labor may modify the terms of an existing contract respecting minimum rates of pay and maximum hours of labor as he may find necessary and proper in the public interest or to prevent injustice and undue hardship."
- i. The Secretary (Title 41, Section 353(b)) has the authority to make "such rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions" of the act "... but only in special circumstances where he determines that such limitation, variation, tolerance, or exemption is necessary and proper in the public interest or to avoid the serious impairment of government business ...."
- j. The act provides that overtime will be based on the worker's "regular or basic hourly rate of pay (or other alternative rate upon which premium rate of overtime compensation is computed)" but is silent upon the number of hours after which overtime rates must be paid. The 40-hour provision of the FLSA or the requirements of the Contract Work Hours and Safety Standards Act would apply where otherwise applicable.
- k. The act is silent on the issue of overtime. The 40-hour standard of the FLSA would apply where otherwise applicable.
- l. Forty hours, prior to the required payment of overtime, is standard. Some exemptions have been built into the statute.

- m. Exception is made with respect to certain prison industry programs where free labor will not be displaced.
- n. The act (Title 41, Section 35(e)) states: "... no part of such contract will be performed nor will any of the materials, supplies, articles, or equipment to be manufactured or furnished under said contract be manufactured or fabricated in any plants, factories, buildings, or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of said contract." The language is intended to include prohibition of tenement production.
- o. Title 41, Section 351(a)(3) states: "... that no part of the services provided by this chapter will be performed in buildings or surroundings or under working conditions, provided by or under the control or supervision of the contractor or any subcontractor, which are unsanitary or hazardous or dangerous to the health or safety of service employees engaged to furnish the services."
- p. Title 29, Section 11(d) of the FLSA states: "The Administrator is authorized to make such regulations and orders regulating, restricting, or prohibiting industrial homework as are necessary or appropriate to prevent the circumvention or evasion of and to safeguard the minimum wage rate prescribed in this chapter ...."

## Establishing Standards

In retrospect, given the history of the federal contract labor standards statutes, it may appear that Congress was unduly optimistic about the ease with which they could be administered. When Davis-Bacon was adopted in 1931, there was little experience upon which to draw. But, as subsequent statutes were adopted, Congress attempted to resolve administrative issues by writing qualifying language into each new piece of legislation. Problems, however, continued to arise and to spark demands that the several statutes be either revised or repealed.

## Setting a Reasonable Wage Rate

Establishing the minimum wage under the Fair Labor Standards Act proved to be relatively simple. Congress would conduct hearings and, at some point, would mandate a national wage floor. The rate (with certain variations) was set forth in the statute, leaving little to the discretion of the Secretary of Labor.<sup>85</sup> There was no need to assess local standards or to develop a database from which to determine comparability. Congress passed legislation and the wage floor was set.

Prevailing wage rates, however, have been quite a different matter. *First*. There were three different approaches: the locally prevailing wage (Davis-Bacon), the locally prevailing minimum wage (Walsh-Healey), and “the minimum monetary wages ... in accordance with prevailing rates for such employees in the locality” (McNamara-O’Hara). *Second*. In none of the statutes was the concept of *minimum* and/or *prevailing* actually defined. Nor did the statutes provide the Secretary with a precise formula for their calculation. As discussed above, the Walsh-Healey rate would become, by default, coequal with the federal minimum wage under the FLSA. *Third*. There were a variety of qualifiers that the Department had to take into account. For example, how was one to define the “various classes of laborers and mechanics” for Davis-Bacon purposes or the “various classes of service employees” for McNamara-O’Hara rates? In the case of the latter, the Secretary was directed to “give due consideration to” the “rates that would be paid by the Federal agency to” service employees had they chosen to use direct federal workers—but not necessarily to be bound by it. Ultimately, Davis-Bacon and McNamara-O’Hara rates would include a fringe benefit component: not an easy figure to determine. *Fourth*. The rates (for Davis-Bacon and McNamara-O’Hara) were to be associated with the individual crafts or types of work performed—notwithstanding the absence of “standardization of job titles and job content.”<sup>86</sup>

<sup>85</sup> Secretarial discretion was allowed in administration of the FLSA: for example, in refining certain of the concepts the act and in applying the statute to the workplace and to certain specialized groups of workers such as children and persons with disabilities.

<sup>86</sup> Gerald D. Reilly, Reuben S. Haslam, and Rudolf Modley, “Threat of the Walsh-Healey Act,” *Harvard Business Review*, January 1951, p. 87. (Hereafter cited as Reilly, et al., *The Threat*.) Concerning the wage rate determination process, see also Modley, et al., *Problem Child*, pp. 221-246; Armand J. Thieblot, Jr., *The Davis-Bacon Act* (Philadelphia: University of Pennsylvania Press, 1975), pp. 31-76 (hereafter cited as Thieblot, *The Davis-Bacon Act*.); Jules Backman and Marvin Levine, “The Prevailing Minimum Wage under the Walsh-Healey Act,” in Emanuel Stein, ed., *Proceedings of the Fourteenth Annual Conference on Labor, New York University* (Albany: Matthew Bender, 1961), pp. 393-435; and James C. Fontana, “Employer Obligations under the Service Contract Act: Just Another Minimum Wage Law?,” *Public Contract Law Journal*, spring 1996, pp. 495-505. O. R. Strackbein, in *The Prevailing Minimum Wage Standard: A Study of the Wage Standard Established by the United States Government for the Purchase of Its Supplies* (Washington: Graphic Arts Press, 1939), presents a clear discussion of the wage rate determination problems associated with Davis-Bacon and Walsh-Healey during the 1930s. (Hereafter cited as Strackbein, *The Prevailing Minimum Wage Standard*.)

## The Locality Issue

The concept of “locality” might be *reasonably* clear where Davis-Bacon was concerned. If one were building a dam, the work had a fixed site—unless, of course, portions of the work were to be fabricated at a distant location and transported to the actual “site of the work.” Moreover, workers of the skill needed for a project might not be locally available. Both the Department in calculating a wage and the contractor when recruiting a workforce might need to look to an adjoining jurisdiction (perhaps a locality several states away) in order to find comparably skilled workers employed “on projects of a character similar ....”<sup>87</sup>

With Walsh-Healey, the process was more difficult. A contract for army uniforms, for example, might be let out for bids in Washington, D.C.; but the actual work might be performed anywhere: New Orleans, Grand Rapids, San Juan. The production location might not be known when bids were solicited. And, to add a dimension of complexity, a uniform might involve components from a variety of jurisdictions: buttons, zippers, braid. Under such circumstances, what was the locality for wage rate determination purposes?

The concept of *locality* appears in the Walsh-Healey Act in the phrase, “... or groups of industries currently operating in the locality ....” Rudolf Modley, et al., explain that, because the Secretary has never used “groups of industries” as a basis for wage rate determination, “he always felt free to ignore the ‘locality’ language of the act.” Further, they note, the Secretary “has taken the position that determinations are to be made on a nationwide or industrywide basis where an analysis of government procurement shows that bids are submitted, and contracts awarded, for delivery on a nationwide basis.”<sup>88</sup> Thus, a variety of geographical standards might apply.

Under the Service Contract Act, the problems are similarly difficult. Wage rates for janitors, working under a McNamara-O’Hara contract to clean a federal building in downtown El Paso, could readily be identified through a local market survey. But, when service workers came to include diverse crafts, white collar and technical workers, the range of rates became equally diverse. Computer service workers, for example, could be sited almost anywhere.

## Competing or Complementary Structures

Through the years, an elaborate structure of labor standards has been developed: each with its own body of implementing regulations and enforcement/compliance guidelines.

- There is the body of laws enacted to protect persons engaged in federal contract work: Davis-Bacon, Walsh-Healey and McNamara-O’Hara. Various (and differently), these statutes deal with wages and hours of work (overtime pay rates). In the case of Walsh-Healey, there are concerns about child and prison labor, and industrial homework.
- To these must be added the Contract Work Hours and Safety Standards Act (CWHSSA, supplementing the Davis-Bacon Act and, in some cases, the McNamara-O’Hara Act). Most employers of workers, engaged on federal contract work, will also be subject to the Occupational Safety and Health Act.
- Separate from the federal contract labor standards statutes (but applicable to the same bodies of workers), there is the FLSA setting minimum wages, overtime pay rates, restraining child labor and industrial homework, etc. Most often,

<sup>87</sup> On the locality issue, see Strackbein, *The Prevailing Minimum Wage Standard*, pp. 69-108.

<sup>88</sup> Modley, et al., *Problem Child*, p. 218.

employers engaged in federal contract work will be subject to the FLSA and the CWHSSA—in addition to Davis-Bacon, Walsh-Healey and McNamara-O’Hara.

- Although not treated here (it is not directly a federal issue) there is a body of state labor standards that deal with minimum wages, overtime pay, and occupational safety laws (sometimes in conjunction with OSHA). Where work is conducted with mixed state and federal funding, the higher standard or a combination of requirements could apply.
- More recently, there has developed a new body of wage laws, largely at the municipal level: namely, the “living wage” laws. Though they vary among jurisdictions, they generally set minimum wage and related standards that must be met when contractors do business with local governmental units.<sup>89</sup>

The various labor standards laws are different, each from the other: in their requirements, the triggering mechanisms, their coverage, etc. Since they are living statutes, they can be expected to change from time to time.

## Concluding Comment

Each of these protective legal structures—the federal contract labor standards statutes, the FLSA, and the state and local protective legislation—was enacted to protect workers and to assist, in some measure, in stabilizing industry and the workplace. Each, very largely, has developed in a separate pattern as legislators (responding to workplace realities: accommodating workers, employers and the public) have modified the statutes, adding technical corrective provisions and giving way to the need for flexibility. Hardly static, the statutes have been in a continuing state of evolution.

Some have argued with respect to the federal structure, that it is dated, difficult to enforce and to comply with, and very much in need of updating.<sup>90</sup> Is such updating worth considering? Could it be achieved without major change to the substance of protections that have been crafted through nearly a century? At the same time, some may question whether advocates of modernity (of flexibility, of bringing labor standards law into the 21<sup>st</sup> century) want to update or to diminish the protective qualities of the statutes to the point of de facto repeal.<sup>91</sup>

Through the years, some have questioned a certain redundancy in the labor standards law structure and the continuing need for protective standards for federal contract workers separate from those applicable to the workforce at large.<sup>92</sup> Might a consolidation of the statutes be useful?

<sup>89</sup> The literature on the “living wage” laws is extensive. Among other sources, see Robert Pollin and Stephanie Luce, *The Living Wage: Building a Fair Economy* (New York: The New Press, 1998); Stephanie Luce, “‘The Full Fruits of Our Labor’: The Rebirth of the Living Wage Movement,” *Labor History*, November 2002, pp. 401-409; Charles W. Baird, “The Living Wage Folly,” *Government Union Review*, September 2002, pp. 31-37.

<sup>90</sup> See, for example Timothy J. Bartl, *Work and Pay in the New Century: Upgrading Our Wage and Hour Laws To Meet the Needs of Today’s Employees* (Washington: Labor Policy Association, 2002); and *Building America’s Workforce for the 21<sup>st</sup> Century* (Washington: Employment Policy Foundation, 2001).

<sup>91</sup> See, for example *Reinventing the Fair Labor Standards Act To Support the Reengineered Workplace*, a report prepared by the Labor Policy Association, an industry-oriented group, October 7, 1994, reprinted in U.S. Congress, House Committee on Economic and Educational Opportunities, Subcommittee on Workforce Protections, *Hearings on the Fair Labor Standards Act*, 104<sup>th</sup> Cong., 1<sup>st</sup> sess., March 30, June 8, October 25, and November 1, 1995 (Washington, GPO, 1996), pp. 26-53.

<sup>92</sup> See, for example Reilly, et al., *The Threat*, p. 87; Modley, et al., *Problem Child*, p. 210; and Charles Donahue, “The Davis-Bacon Act and the Walsh-Healey Public Contracts Act: A Comparison of Coverage and Minimum Wage Provisions,” *Law and Contemporary Problems*, spring 1964, pp. 511-512.

Were that attempted, how complex might that process become and what difficulties might be encountered?

Are there areas in which reform *is* needed and where, through restructuring, the labor standards statutes could be rendered easier to enforce, more protective of workers and less burdensome for employers?

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